Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

CHARLES GOSS,

Cross-Petitioner,

vs.

CITY OF LITTLE ROCK,

Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether a circuit court's reversal of a district court's order to rezone property was proper when, in addressing the issue of remedy after the appellant city briefed the legitimate reasons for denying the rezoning, the appeal court found that the district court's order was based on an erroneous application of the law, and when the reviewing standard employed was consistent with that of other circuits.

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BRIEF IN OPPOSITION

The Cross-Respondent, City of Little Rock, respectfully requests that this Court deny the Conditional Cross-Petition for writ of certiorari filed by Charles Goss, seeking review of the Eighth Circuit's opinion in this case, which Cross-Petition was received by Cross-Respondent on February 3, 1999. The opinion appealed from is reported at 151 F.3d 861 (8th Cir. 1998).

STATEMENT OF THE CASE

The City of Little Rock has provided in some detail the factual background of this case in its own petition. To avoid repetition, the City respectfully refers the Court to that Statement of the Case, incorporating it by reference, and confines its efforts here to pointing out the mistakes present in the Statement of the Case provided by Mr. Goss in his petition and giving the reasons why the Court should deny the writ sought in the Conditional Cross-Petition.

A. Goss does not accurately describe the status of his property.

Goss is in error when he describes his property as nonconforming with its R-2 zoning. While it is true that the lot with the businesses is nonconforming, the lot with Goss's residence, which represents at least half of the property Goss sought to rezone (R. 61-62), conforms with its designated R-2, Single Family Residential zoning

(R. 162, 244), and is therefore not "nonconforming." Furthermore, it was not necessary for Mr. Goss to have the property "rezoned to conform to its use in order to sell the property" as he claims. Cross-Pet. p. 4. Not only did the use of at least half the property already conform with the existing zoning classification, the uncontroverted testimony of the City's real property valuation expert was that a denial of rezoning would not reduce the value of the property or prevent Goss from selling the property for continued use of the existing businesses (R. 297-99).

B. Goss mistakenly characterizes the actions of the Planning Commission and the Board of Directors.

The Planning Commission did not impose a dedication requirement as Goss contends. The Planning Commission merely makes a recommendation to the City Board of Directors, which collectively has the power to make rezoning decisions and to decide whether to waive dedication requirements. In discussing the letter sent to Goss by the Planning Commission secretary, Goss implies, in error, that the "approval" of Mr. Goss' rezoning petition was what was on the Board's agenda, Cross-Pet. p. 4, when it was actually the "item" that was on the agenda. Plaintiff's Exh. 2.

Goss also mischaracterizes the action taken by the Board of Directors as a "final vote upon the waiver of the City's dedication requirement." Cross-Pet. p. 5. The action taken by the City Board was a singular vote on an ordinance that if passed, would have both rezoned the property from R-2 to C-3 General Commercial and waived the dedication of right-of-way. App. I 1-4. The

ordinance did not pass. Therefore, the rezoning petition was denied, and the intertwined waiver request – moot at that point – also failed. Thus, the City disputes that this action by the Board amounted to a demand. The City further disputes the characterization by Goss that the Board, after a lengthy discussion, "formally imposed the condition that, in order for the property to be rezoned, Mr. Goss would be required to dedicate to the City of Little Rock, free of charge, a 55 foot right-of-way in exchange for rezoning the property at issue to C-3." Cross-Pet. p. 5.

C. Goss misstates the district court's ruling.

Goss misstates the district court's ruling granting the City's motion to dismiss when he says that the ruling was based on Fed. R. Civ. P. 12(b)(1) as well as 12(b)(6). It is clear in the opinion that the district court specifically cites to Fed. R. Civ. P. 12(b)(6) but not to Rule 12(b)(1), and the court's opinion never mentions the word "jurisdiction." App. C4. The opinion proceeds to state that Goss had not alleged a diminution in value of his property, that he had not suffered a loss as a result of the denial of his application, and that the availability of a state-court remedy for inverse condemnation "precludes a finding that any taking of plaintiff's property is in violation of a right, privilege or immunity secured by the Constitution or laws of the United States." App. C5-6. The opinion then discussed substantive due process and procedural due process before granting the motion to dismiss. This is far different from stating that federal

courts lack jurisdiction to hear Goss's case. Instead, the question of jurisdiction was passed on *sub silentio*.

Goss, citing Petitioner's App. C and D, also states that the district court dismissed the lawsuit and "specifically stated that *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) did not apply to the facts of the case." Cross-Pet. p. 3. The Memorandum and Order that dismissed the lawsuit mentioned neither case. App. C. In addition, the *Nollan* case was also not cited in the district court's order denying Goss's Motion to Alter Judgment. App. D. In the order denying the Motion to Alter Judgment, the district court does refer to the *Dolan* case and explains its inapplicability. In so doing, it specifically states: "The Court did not cite this case in its Memorandum and Order because the nature of plaintiff's complaint and his response to the City's motion to dismiss did not require it." App. D2.

Another misstatement by Goss is that the district court opinion (after trial) concluded that the City had indeed "attempted a taking" of Mr. Goss's property, in contravention of *Nollan* and *Dolan*. Cross-Pet. p. 6. Although the opinion concluded, consistent with the findings of the Eighth Circuit and the evidence adduced at trial, that the City had not met its burden of demonstrating rough proportionality and was therefore required to rezone the property to C-3 without a dedication of any property rights, it never actually stated that the City's actions effected a taking or even the claimed "attempted" taking. App. E10-11. Furthermore, the district court opinion specifically found that the required nexus between

the rezoning and the requested dedication does exist, App. E6-7, and it never mentioned the *Nollan* case at all.

D. Goss misstates Arkansas law on available remedies for inverse condemnation.

Although Goss contends that the only state remedy available to him would result in the loss of his property to the City, Cross-Pet. p. 5, equitable relief is available in Arkansas to enjoin takings until just compensation is provided. *MAK Co. v. Smith*, 763 F. Supp. 1003 (W.D. Ark. 1991).

E. Goss mischaracterizes the City's arguments on appeal and the Eighth Circuit's ruling reversing the order to rezone.

Contrary to Goss's claim, the Eighth Circuit's ruling on the reversal of the order to rezone did address the propriety of the district court action, as discussed in Section I below. Goss leaves the impression in his Statement of Facts that the City did not specifically appeal or argue reversal of the district court's order to rezone his property. The City disputes that contention in Section II below.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

I. No conflict exists among the circuit courts of appeals on the standard for reviewing a district court's order concerning injunctive relief.

Goss's Cross-Petition presents no significant constitutional issue for this Court to review. It is well-settled law that federal courts are not to act as zoning boards of appeal. The Eighth Circuit recognized this point and corrected the district court's efforts to the contrary.

Goss erroneously posits that the standard employed by the Eighth Circuit in reversing the district court's order to rezone conflicts with that of other circuits, namely the First, Second, Ninth, and Tenth Circuits. After trial of this matter, the district court ordered the City to rezone Goss's two lots from R-2 Single Family residential zoning to C-3 General Commercial zoning. The Eighth Circuit reversed the injunction because "Little Rock has a legitimate interest in declining to rezone Goss's property, and the city may pursue that interest by denying Goss's rezoning application outright, as opposed to denying it because of Goss's refusal to agree to an unconstitutional condition. . . . " App. A6. In support of its ruling, the Eighth Circuit cited *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835-36 (1987) for the proposition that "government may deny the applicant's request outright if it has a legitimate interest in doing so." App. A6.

Goss states, correctly, that the First, Second, Ninth, and Tenth Circuits employ an abuse-of-discretion standard in reviewing the grant of an injunction. Other circuit courts also follow an abuse-of-discretion standard of

review for decisions regarding injunctive relief. *See, e.g., Valenti v. Mitchell,* 962 F.2d 288, 298-99 (3d Cir. 1992); *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.,* 984 F.2d 113, 116 (4th Cir. 1993); *Dayton Area Visually Impaired Persons, Inc. v. Fisher,* 70 F.3d 1474, 1480 (6th Cir. 1995); *Wesch v. Folsom,* 6 F.3d 1465, 1469 (11th Cir. 1993).

Despite Goss's claims to the contrary, the Eighth Circuit likewise follows the abuse-of-discretion standard for reviewing a district court's grant of injunctive relief. *First Bank v. First Bank System, Inc.,* 84 F.3d 1040, 1044 (8th Cir. 1996); *Hosna v. Groose,* 80 F.3d 298, 303 (8th Cir. 1996); *Thompson v. Edward D. Jones & Co.,* 992 F.2d 187, 189 (8th Cir. 1993). According to the Eighth Circuit, "[a]buse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Hosna,* 80 F.3d at 303.

While appellate courts uniformly employ an abuse-of-discretion standard for decisions on injunctions, they do not necessarily defer to district courts when the district court has based its decision on an erroneous legal conclusion. *See, e.g., Molecular Technology Corp. v. Valentine,* 925 F.2d 910 (6th Cir. 1991) ("This court may, in its discretion, consider clear errors in the proceedings below in an unusual case *sua sponte* regardless of the inattentiveness of the court or the parties."). *See also Uno v. City of Holyoke,* 72 F.3d 973, 978 (1st Cir. 1995) ("the jurisprudence of clear error 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' "); *United States v. McCombs,*

30 F.3d 310, 317 (2d Cir. 1994) (" 'when the issue is [the trial court's] application of a legal standard to facts undisputed or reasonably found' our review is not limited by the clearly erroneous standard and we will not shy away from plenary review where . . . 'the result does not jibe with the applicable rule of law.' "); *Carey v. Pennsylvania Enterprises, Inc.*, 876 F.2d 333, 337 (3rd Cir. 1989) ("Our review of the district court's application and interpretation of legal principles predicate to its grant or denial of injunctive relief is plenary."); *Virginia Carolina Tools, Inc.*, 984 F.2d at 116 ("While decisions pertaining to injunctive relief normally are reviewed solely for abuse of discretion in applying the injunction standard, [the Fourth Circuit] review[s] such a decision *de novo* where it 'rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.' ") (citations omitted); *Dayton Area Visually Impaired Persons, Inc.*, 70 F.3d at 1480 (Sixth Circuit appellate review under the abuse-of-discretion standard; district court determination disturbed only if it relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard); *United States v. BNS, Inc.*, 858 F.2d 456, 460 (Ninth Circuit will reverse or modify an order granting preliminary injunction if the court based its decision on erroneous legal standards or otherwise abused its discretion); *Guadamuz v. Bowen*, 859 F.2d 762, 766 (9th Cir. 1988) (stating "grant of permanent injunctive relief is reviewed for an application of erroneous legal principles"); *United States v. Jenks*, 22 F.3d 1513, 1519 (10th Cir. 1994) (grant of injunction reviewed under abuse-of-discretion standard and court has authority to modify it if it is overbroad);

Wesch v. Folsom, 6 F.3d at 1469 ("The grant of an injunction is reviewed for abuse of discretion. . . . However, if the trial court misapplies the law we will review and correct the error without deference to that court's determination.").

No conflict exists among the circuits regarding the standard of review for injunctive relief or an appellate court's authority to review and correct an injunction where it is predicated on an erroneous legal principle. Therefore, this issue does not merit Supreme Court review.

II. The Eighth Circuit's reversal of the order to rezone Goss's property has not expanded the scope of federal appellate jurisdiction.

Goss claims that the reversal of the district court's order to the City to rezone his property improperly expanded the jurisdiction of the United States Circuit Courts of Appeals. The authority of federal appellate courts in review is set forth in 28 U.S.C. § 2106 (1998):

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

This provision "gives a court of appeals some latitude in entering an order to achieve justice in the circumstances." *United States v. Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983). This is so even in some

cases where the issue decided was not within the issues formally appealed. *Id.* "[L]itigants' failure to address the legal question from the right perspective does not render us powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties' circumstances." *Williams-Guice v. Board of Educ. of City of Chicago*, 45 F.3d 161, 164 (7th Cir. 1995).

This Court has of course recognized an appellate court's power to correct errors of law. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In *Bose*, the Court's attention was directed to the language of Fed. R. Civ. P. 52(a), which states that a trial court's findings of fact are not to be set aside unless clearly erroneous. The *Bose* Court stated:

> Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.

Id. at 501. As noted in Section I above, the circuit courts of appeals employ their authority to reverse or modify injunctive relief ordered by district courts under appropriate circumstances. Because the Eighth Circuit's action in reversing the injunction was within its statutory authority of review, it does not merit this Court's review.

Supreme Court review of the reversal of the order to rezone is also not warranted because the issue of the legitimacy of the City's interests in denying the rezoning was briefed at length by the City in the Appellant's Brief and was at the core of the City's appeal before the Eighth

Circuit. One of the specified issues before the Eighth Circuit was the following: Would rezoning Goss' property and granting a waiver of dedication have an adverse impact on the City's legitimate interests, such that there was no Fifth or Fourteenth Amendment violation when the City denied the rezoning and waiver? Appellant's Brief p. 25. The propriety of the denial of rezoning was inextricably intertwined with that issue, and the City argued at length in its brief that the City Board of Directors had legitimate reasons for denying the rezoning and waiver measure Goss had placed before it. Appellant's Brief pp. 29-34, 36-37.

The brief advanced specific reasons for the denial of rezoning: the expressed opposition of neighbors, the residential zoning and character of the surrounding properties, the fact that 81 uses would immediately be available by right under C-3 zoning, that commercial rezoning of the R-2 lot with Goss's house would have created a nonconformity, and that the zoning Goss sought was more intense than that called for under the adopted land use plan. The brief stated other reasons for denying the rezoning and waiver, including the fact that granting a waiver of dedication would have foreclosed the City from obtaining a reasonable dedication of right-of-way at any later time, regardless of the impact of more intense development, and that rezoning with a waiver, while a windfall to Goss, would force taxpayers to either suffer the ill effects of increased congestion or pay Goss for needed right-of-way expansion at the higher commercial market value rate instead of the residential market rate. The City

also cited *Nollan* for the proposition that, under the circumstances, the governing body in that case could lawfully have denied the Nollans' request for a permit if it had so chosen, Appellant's Brief p. 24, the same proposition that was cited in the Eighth Circuit's reversal of the order to rezone. Thus, the factual and legal bases for not rezoning the property were properly raised and briefed to the Eighth Circuit.

In an earlier case, the Eighth Circuit addressed a similar contention of jurisdictional expansion through a *sua sponte* judgment on an issue not raised on appeal. *Silman Custom Painting, Inc. v. Aetna Life & Cas. Co.*, 990 F.2d 1063, 1069-70 (8th Cir. 1993). At issue was the court's authority to declare as error the district court's judgment on a counterclaim and the appeal court's order to the district court to enter a declaratory judgment that Aetna was a valid assignee. It was asserted that the issue was not presented on appeal and that the Eighth Circuit decided the issue *sua sponte*, and created "a boundless exception to the limits of Appellate Court jurisdiction." *Id.* at 1069-70. The Eighth Circuit rejected the contention, citing 28 U.S.C. § 2106 (1988). *Id.* at 1069. Furthermore, the court concluded that it had determined the offset issue brought before it and decided that, although Aetna was not entitled to the offset it claimed, it was entitled to a lesser form of relief. In addition, the court noted that the issue of Aetna's rights was raised in oral argument.

In this case, the City raised and argued in its appellate brief the issue of the validity of the City Board's action in denying the rezoning in the context of adverse impacts on the City's legitimate interests. The Eighth Circuit determined the City was entitled to a reversal of

the order to rezone, an action well within its statutory jurisdiction and in keeping with the decisions of other courts of appeal, as noted in Section I above.

Without a conflict in the circuits or improper expansion of jurisdiction, no issue of importance is raised and no writ of certiorari is warranted on Goss's Cross-Petition.

CONCLUSION

For the foregoing reasons, Cross-Petitioner's Conditional Cross-Petition for writ of certiorari should be denied.

Respectfully submitted,

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